No. 83-5767

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MICHAEL DALE LEATHERWOOD,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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1. Petitioner contends that the duplication of "robbery" and "pecuniary gain" as separate aggravating factors supporting his death sentence, created a substantial risk of an unreliable "balancing" under Mississippi's death sentencing statute -- where statutory mitigating factors were also present. Whether the Eighth Amendment tolerates such unreliability in the face of statutory mitigating factors is an important question left open last term by Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418 (1983).

Respondent's only apposite response is a quotation from Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983). In Henry, the Fifth Circuit upheld an application of both robbery and pecuniary gain as aggravating circumstances where the trial judge, relying on Barclay, explicitly found no mitigating

circumstances. Thus, Henry does not illuminate the issue left open in Barclay.

Another fact distinguishes Henry. There, the duplicative factors in a Florida statute were weighed by a judge who may have discounted the duplicativeness. Here, the duplicative factors were weighed against mitigation factors by a jury, which was not cautioned or guided regarding the duplicativeness of the Mississippi factors.

Since this petition was filed, the Court decided Pulley v. Harris, ___ U.S. ___, 52 U.S.L.W. 4141 (January 23, 1984), which, unlike this case, dealt with the facial validity of death sentencing statutes -- specifically, whether such statutes had to provide for proportionality reviews. The Court noted that any capital sentencing scheme may produce "aberrational outcomes," but suggested that at least in Pulley such "inconsistencies" did not rise to the level of "major systemic defects identified in Furman." Id., 52 U.S.L.W. at 4145.

Petitioner submits that the present case involves a "systemic defect" in how Mississippi applied the statutory sentencing factors in its balancing scheme. By using the same evidence to invoke two factors to support the sentence of death below, at least one of the duplicative factors became tainted. Without guidance, petitioner's jury was instructed to balance these duplicative factors against statutory mitigating factors established by the evidence (Pet. at 4-5) -- creating a significant risk that the balancing process was unreliable and hence arbitrary. The entire process was thus systemically infected. Although respondent claims that Mississippi law permitted the jury to impose a life sentence notwithstanding this balancing process (Brief in Opposition at 6), the jury was not so explicitly instructed. Indeed, as expounded in

petitioner's Issue No. 3, petitioner's requested instruction to this effect was rejected.

Petitioner's case presents a factually clear and appropriate occasion for the Court to illuminate the issue of when an invalid application of sentencing factors so infects a death sentencing process as to cross the threshold of constitutional impermissibility -- issues not reached in Zant v. Stephens, ____ U.S. ___, 103 S. Ct. 2733 (1983), or in Barclay v. Florida, supra. Respondent cannot and does not dispute that Issue No. 1 is ripe for the granting of certiorari.

2. Respondent does contest the ripeness of petitioner's second issue -- whether Mississippi unconstitutionally applied a vague aggravating factor (that the murder was "especially heinous, atrocious or cruel") by compelling petitioner to reenact before the jury his role in the crime. Respondent misperceives the standard for granting certiorari. Although petitioner at the state level raised the issue below in state law terms, the Mississippi Supreme Court addressed and disposed of the issue in federal constitutional terms. It explicitly reaffirmed its prior holding that Godfrey v. Georgia, 446 U.S. 420 (1980), was a narrow decision limited to its peculiar facts -- and thus Godfrey, in Mississippi's view, did not in any way preclude the forced demonstration to establish whether the murder was "especially heinous, atrocious and cruel." Since the highest state court below reached and decided the federal constitutional issue, certiorari may properly be granted. See, Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914).

3. For similar reasons, respondent misperceives the ripeness of petitioner's Issue No. 3. Although not raised by petitioner's counsel on appeal, the federal constitutional

issue was embraced by two of the dissenting Justices. Hence, it was sufficiently preserved. Gardner v. Florida, 430 U.S. 349, 361 (1977) (when some members of a reviewing court expressly consider a point below, this Court presumes that the entire Court has passed on the question); see Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982).

Petitioner contends that it was constitutional error for the Mississippi trial court to refuse requested jury instructions (a) that death need not be imposed even if the jury found an aggravating circumstance, and (b) that mitigating circumstances need not be found to return a sentence of life. Respondent has now implicitly conceded the validity of these requested instructions under Mississippi law -- by confirming that petitioner's jury had the power to make the very determinations at issue in those instructions:

> In other words, even in the complete absence of mitigating factors, a sentencing jury is not compelled legislatively [in Mississippi] to return a sentence of death no matter how many aggravating factors it has before it.

(Brief in Opposition, at 6).

Since a capital defendant has a constitutional right to present all mitigating considerations that might bear on his sentence, Lockett v. Ohio, 438 U.S. 586 (1978), and to obtain an "individualized" sentence, Zant v. Stephens, supra, it should follow that the same defendant has a constitutional right, consistent with state procedural requirements, to be granted jury instructions that give effect to his mitigating considerations -- particularly when the state sentencing statute supports the requested instructions. Although at least one

federal court has recognized this federal right, Washington v. Watkins, 655 F.2d 1346, 1374 (5th Cir. 1981), cert. denied, 102 S. Ct. 2021 (1982), this Court has not passed on the question.

4. Petitioner contends that once a proportionality review is provided by statute, "due process protections are necessary to ensure that the state-created right is not arbitrarily abrogated." Vitek v. Jones, 445 U.S. 480, 488-89 (1980). This due process guarantee is unaffected by this Court's recent decision in Pulley v. Harris, supra. Indeed, Pulley leaves unanswered fundamental questions of (1) whether appellate review must be "meaningful" and (2) whether states that mandate a proportionality review may conduct that review without any objective criteria being articulated or ostensibly applied by the reviewing court.

This case presents these issues squarely. Petitioner's individual situation is distinct from all Mississippi defendants sentenced to death under its post-Furman death penalty statute. Petitioner's prior record was spotless. (Pet. at 2.) He was neither the triggerman nor the initiator of the crime. (Pet. at 3.) Several statutory mitigating circumstances were established. (Pet. at 4-5.)[1/] In these aggregate respects, petitioner differed from other persons receiving the death penalty in Mississippi. (Pet. at Appendix 8.)

Yet, the Mississippi Supreme Court in its proportionality review did not mention any of these circumstances. No mention was made of how petitioner's individualized circumstances compared with others receiving the death penalty. No reference was even made to the trial judge's sentencing report.

1/ At the same time, of the four aggravating circumstances found by the jury, three were legally or factually suspect. (Pet. at 5-6).

(Pet. at 24a.) The review was limited (a) to a summary paragraph appearing (with slight variations) in Mississippi's last six death penalty decisions and (b) to a simple listing of post 1977 death penalty cases.[2/]

Respondent does not dispute that the review below was so limited, but instead cites twelve Mississippi cases and contends that a proportionality review by this Court would show petitioner's sentence not to be disproportionate. (Brief in Opposition, at 17.) If such de novo review were appropriate, the Annex to this Reply Brief discloses circumstances that distinguish petitioner's situation from that of the defendants in twelve cases cited by respondents. However, the only matter now properly before this Court relates to be whether a state supreme court, required by statute to undertake a proportionality review of a death sentence, must articulate and apply objective criteria to assure that the review is meaningful.

Petitioner submits that if the question of minimum standards of appellate review are to be addressed in the context of state-mandated proportionality reviews, the present case is an appropriate one to resolve this important issue.

Respectfully submitted,

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2/ See "Comment: Constitutional Problems Concerning Certain Aggravating Circumstances Used for Capital Sentencing In Mississippi," 53 Miss. L. J. 319 (1983).

ANNEX

Factors Distinguishing Petitioner's Case From The Mississippi Death Cases Relied Upon By Respondent

1. Smith v. State, 419 So.2d 563 (miss. 1982) (triggerman, prior criminal record and previous firing of deadly weapon)

2. Edwards v. State, 413 So.2d 1007 (Miss. 1982) (triggerman and prior criminal record including capital murder conviction)

3. Bullock v. State, 391 So.2d 601 (Miss. 1980) (actively beat the victim)

4. *Reddix v. State, 381 So.2d 999 (Miss. 1980) (prior criminal record including two armed robberies and two kidnappings)

5. *Jones v. State, 381 So.2d 983 (Miss. 1980) (prior criminal record including armed robbery)

6. Culberson v. State, 379 So.2d 499 (Miss. 1979) (triggerman, prior criminal record including armed robbery and assault with intent to kill)

7. *Voyles v. State, 362 So.2d 1236 (Miss. 1978) (triggerman)

8. *Irving v. State, 361 So. 2d 161 (Miss. 1978) (prior criminal record including burglary)

9. *Washington v. State, 361 So.2d 161 (Miss. 1978) (triggerman, prior criminal record)

10. *Bell v. State, 360 So.2d 1206 (Miss. 1978) (prior criminal record including capital murder, two robberies, two burglaries and assault with intent to kill)

11. Evans v. State, 422 So.2d 737 (Miss. 1982) (triggerman, prior criminal record and under life sentence when murder committed)

12. Wheat v. State, 420 So.2d 229 (Miss. 1982) (triggerman, prior criminal record including second degree murder, assault with weapon and false imprisonment)

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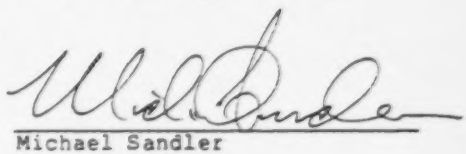
* Death sentence was subsequently vacated by federal court:

Reddix v. Thigpen, 554 F. Supp. 1212 (S.D. Miss. 1983); Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983); Voyles v. Watkins, 489 F. Supp. 901 (N.D. 1980); Irving v. Hargett, 518 F. Supp. 1127 (N.D. Miss. 1981); Washington v. Watkins, 655 F.2d 1346, 1374 (5th Cir. 1981); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1984, a copy of this Reply Brief On Petition For Writ of Certiorari To The Supreme Court of the State of Mississippi was mailed, postage prepaid, to Edwin Lloyd Pittman, Attorney General, Post Office Box 220, Jackson, Mississippi 39205.



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